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C O N F I D E N T I A L SECTION 01 OF 03 RANGOON 000262

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SUBJECT: BURMA,S CONSTITUTION - A SETTING SUN

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Classified By: Pol Officer Sean O'Neill for Reasons 1.4 (b) & (d)

SUMMARY

1. (SBU) The regime's proposed constitution appears to be a poorly drafted, often ambiguous document that will likely serve to preserve the military's control over Burma. While it enumerates a number of basic civil liberties, it also carves out broad exceptions that allow the regime to violate these rights at will. It provides for popularly-elected legislators, but bars many citizens from office and ensures that at least 25 percent of the parliament will be in the hands of the military. A civilian president will serve as the head of state, but not commander in chief of the armed forces. Localities will have their own regional governments, but can only exercise limited administrative powers granted them by the central government. The constitution can be amended, but in practice any change will require the approval of at least some of the military MPs. In short, the only constituency well served by the draft charter would be the Than Shwe regime. We prepared this analysis by comparing the Burmese-language version of the proposed constitution with the English version of the 104 Principles on which the constitution is based. A more definitive analysis awaits an English translation of the constitution itself.

CIVIL LIBERTIES

2. (SBU) Chapter Eight of the regime's draft constitution sets forth the fundamental rights of citizenship but carves out broad exceptions allowing the government to suspend most rights at will. The draft enumerates a number of universally-accepted rights, such as freedom of speech, assembly, and association, but qualifies them. It sets forth criminal due process rights, such as the right to legal counsel, prohibits the passage of ex post facto laws, and grants the Supreme Court the power to issue writs of habeus corpus. Forced labor, gender, race, and religious discrimination are prohibited. Certain less-common positive rights, such as the right to education and health care, are

also guaranteed.

¶3. (SBU) However, Chapter Eight contains a number of provisions which serve to severely limit these rights in practice. One provision allows the government to "restrict or abrogate" rights that interfere with the military's duty to "maintain discipline and public order." A provision prohibiting the detention of citizens for more than 24 hours without charge contains an exception for "precautionary measures taken...for the security of the state, law and order, or peace and tranquility." The provision providing for freedom of speech, assembly, and association qualifies those rights as "subject to the laws enacted for State security, law and order, community peace, or public order and morality."

LEGISLATURE

¶4. (SBU) Chapter Four of the constitution creates a bicameral Parliament consisting of both elected civilian and appointed military members. The lower house consists of no more than 440 members, the upper house consists of no more than 224 members. At least 25 percent of the seats of both houses are reserved for military members appointed by the uniformed Commander in Chief of Defense Services. However, because the charter only provides a maximum, but not minimum, number of military and civilian seats, the percentage of military could be higher than 25 percent if fewer civilians are actually seated. The constitution disqualifies from office anyone who has not consecutively lived in Burma for over ten years immediately prior to election, those "entitled to the rights and privileges of a foreign government," any person who has received money or material assistance from a foreign government or religious organization, and anyone who has ever committed an offense that the regime deems should

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disqualify them from office. Under these terms several high-profile opposition leaders, including Aung San Suu Kyi, as well as anyone currently in exile could be excluded from legislative office.

¶5. (SBU) Under the constitution, the Parliament has the right to pass, by simple majority, legislation proposed by a legislative committee or the president. However, the charter stipulates that "studies" concerning defense, security, or the military shall be conducted by a committee of military MPs who have the right to "co-opt non-military MPs." The document appears to grant the president veto power but is ambiguous about the practical consequence of his veto. The language states that the president may send a bill back to Parliament "with comments" and that the Parliament can choose to incorporate them or pass the bill again as originally written. However, there is no mention of whether a bill so returned by the president must be passed by something more than a simple majority or whether the president can object to a bill without making "comments."

EXECUTIVE

¶6. (SBU) Under Chapter Three, the executive branch would consist of one president and two vice presidents, all elected by the Parliament rather than by popular vote. The qualifications for executive office are stricter than for members of Parliament. In addition to the same restrictions that apply to prospective legislators, the president and vice presidents must have lived in Burma consecutively for at least 20 years immediately prior to service, and not have any relatives or spouses who are citizens of a foreign country or who are entitled to the rights and privileges of a foreign country. The constitution also requires that the president and vice presidents "be well acquainted with affairs of the state such as political, administrative, economic, and military affairs," but does not elaborate on what those

qualifications may be.

¶17. (SBU) The rules governing the nomination of the president and vice presidents are complex and vague. The Parliament is to be split into three groups for the purpose of nominating candidates: all elected members of the lower house, all elected members of the upper house, and all military members of both houses. Each group shall nominate one candidate, subject to the approval of an unspecified group of legislative "leaders." The entire Parliament then elects one of the candidates as president, presumably by plurality. The remaining two candidates serve as vice presidents.

¶18. (SBU) The president is the chief executive but not the commander in chief of the armed forces. He or she has the authority to appoint judges with the certification of Parliament that the candidates are qualified under the law. The president cannot, however, appoint the ministers of defense, home affairs, and border areas without the approval of the uniformed commander in chief of defense services. The commander in chief is appointed by the president with the advice and consent of the national defense and security council which consists of the president, two vice presidents, commander in chief of defense services, vice commander in chief, the two chairmen of the lower and upper house, and ministers of defense, home affairs, border areas, and foreign affairs. The law is not clear how the commander in chief and ministers of defense, home affairs, and border areas will be selected initially.

¶19. (SBU) The constitution grants the president the authority to declare a state of emergency for all or part of the country and hand over all governmental power to the military for up to two years. Once invoked, the president can revoke the state of emergency only after the commander in chief has reported that conditions no longer require the imposition of martial law.

JUDICIARY

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¶10. (SBU) Chapter Six creates a judiciary consisting of a supreme court, constitutional tribunal, and lower courts empowered to hear criminal and civil cases. The authority to hear constitutional disputes involving individual rights appears to rest with the supreme court while disputes involving constitutional questions of administrative procedure can be decided by the nine-member constitutional tribunal. The seven to eleven members of the supreme court are appointed by the president for life terms that continue until the mandatory retirement age of 70. The nine members of the constitutional tribunal are appointed in equal proportion by the president, lower house chairman, and upper house chairman.

AMENDMENT

¶11. (SBU) By its terms, the constitution can be amended by a combination of a vote of 75 percent plus one of parliamentarians followed by an unknown percentage of voters in a popular referendum. Amendments must be proposed by at least 25 percent of the members of Parliament. Over 75 percent of Parliament must then approve the amendment before it is subject to a national referendum. Given that at least 25 percent of MPs must be military, any amendment would require the consent of at least a few military members. The constitution is unclear about the percentage of voters who must approve an amendment. The text of the 104 principles states that a simple majority is needed. However, the constitution states that an amendment must be approved "by a vote of all who have the right to vote." On its face this language suggests that an amendment must be approved by every eligible voter in the nation in order to take effect,

although some of our contacts speculate that this may be a typographical error in the Burmese version. This difference has been widely noticed and commented on by the exile press since a draft version of the constitution in Burmese was first circulated.

LOCAL GOVERNMENTS

¶12. (SBU) The constitution establishes a system of state and divisional legislatures but grants them extremely limited administrative powers that does not include education, which the ethnic minorities sought. Local legislators must qualify in the same manner as national MPs. The military is guaranteed at least one third of local seats. The constitution establishes six self-administered zones in Shan State and Sagaing Division, but grants them little substantive power and requires military membership on their local councils. None of the cease-fire groups concerns, including the issue of whether such groups can keep their arms, are addressed in the provisions concerning localities and ethnic minorities. The constitution grants the central government control of key natural resources such as timber, gems, pearls, minerals, and oil and natural gas.

COMMENT

¶13. (C) The Burmese people have waited for nearly 45 years for democracy. We doubt this document addresses their concerns. That is not to say that there are no positive provisions in the text of this charter. There are some. Rather, when taken as a whole, in light of this regime's consistent abuse of power, suppression of debate, and the various qualifications of enumerated rights, Than Shwe appears to have designed a constitution that gives the appearance of democracy while reserving ultimate authority for the military. We will provide further analysis when we have an English translation of the constitution.

VILLAROSA